## IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
Plaintiff,	)	
V.	)	Cr. ID. No. 1106017020
NATHAN R. BOYKIN,	)	
Defendant.	)	

Submitted: December 6, 2013 Decided: January 6, 2014

# COMMISSIONER'S REPORT AND RECOMMENDATION THAT DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF SHOULD BE DENIED AND COUNSEL'S MOTION TO WITHDRAW SHOULD BE GRANTED.

Mark A. Denney, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Richard J. Zemble, Esquire, 1220 N. Market Street-Suite 813, Wilmington, Delaware, 19801, Attorney for Defendant Nathan R. Boykin.

PARKER, Commissioner

This 6th day of January, 2014, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

#### BACKGROUND AND PROCEDURAL HISTORY

- 1 On August 1, 2011, Defendant Nathan R. Boykin was indicted on a number of charges including two counts of Attempted Robbery First Degree, two counts of Assault Second Degree, Burglary First Degree, five counts of Possession of a Firearm During the Commission of a Felony, Possession of a Firearm by a Person Prohibited, Wearing a Disguise During the Commission of a Felony, and Possession of a Destructive Weapon.
- 2. On January 19, 2012, Defendant Boykin pled guilty to six of the charges.<sup>1</sup> Specifically, Defendant pled guilty to one count of Attempted Robbery First Degree, Burglary First Degree, one count of Assault Second Degree, and three counts of Possession of a Firearm During the Commission of a Felony. As part of the plea agreement, the remaining seven charges were dismissed by the State.<sup>2</sup> As a result of the plea agreement, Defendant was facing a minimum sentence of 14 years of incarceration, which was the minimum mandatory sentence, and a maximum sentence of 123 years of incarceration.
- 3. On April 13, 2012, following a pre-sentence investigation, Defendant was sentenced to the minimum mandatory sentence of 14 years of incarceration, followed by decreasing levels of probation.
- 4. Defendant did not file a direct appeal to the Delaware Supreme Court.

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<sup>&</sup>lt;sup>1</sup> January 19, 2012 Plea Agreement. <sup>2</sup> January 19, 2012 Plea Agreement.

#### **FACTS**

- 5. Defendant Nathan Boykin was arrested after a home invasion with a firearm on June 18, 2011. Defendant broke into a home through a window in the middle of the night with a sawed-off shotgun in hand and while wearing a disguise.<sup>3</sup> There were multiple people inside the home including a child. The home invasion did not go as planned a fight ensued inside the home with the victims detaining Defendant until the police arrived.4
- 6. In Defendant's statement to the police, he admitted that he was intoxicated on the night at issue.<sup>5</sup>

#### RULE 61 MOTION AND COUNSEL'S MOTION TO WITHDRAW

- 7. On April 8, 2013, Defendant filed a pro se motion for postconviction relief. In Defendant Boykin's pro se motion, he raised two claims. He claimed: 1) that his counsel was ineffective for failing to advise him that he had a mental illness defense; and 2) that a competency hearing should have been conducted.
- 8. Defendant was thereafter assigned counsel. On October 18, 2013, assigned counsel filed a Motion to Withdraw as Postconviction Counsel pursuant to Superior Court Criminal Rule 61(e)(2).
- 9. Superior Court Criminal Rule 61(e)(2) provides that:

If counsel considers the movant's claim to be so lacking in merit that counsel cannot ethically advocate it, and counsel is not aware of any other substantial ground for relief available to the movant, counsel may move to withdraw. The motion shall explain the factual and legal basis for counsel's opinion and shall give notice that the movant may file a response to the

<sup>&</sup>lt;sup>3</sup> January 19, 2012 Plea Transcript, at pgs. 6-8; April 13, 2012 Sentencing Transcript, at pg. 3, 6-7.

<sup>&</sup>lt;sup>4</sup> April 13, 2012 Sentencing Transcript, at pgs. 6-7.

<sup>&</sup>lt;sup>5</sup> See, Affidavit of Trial Counsel, Superior Court Docket No. 31- Paragraph 5.

motion within 30 days of service of the motion upon the movant

- 10. In the motion to withdraw, Defendant's Rule 61 counsel represented that, after undertaking a thorough analysis of the Defendant's claims, counsel has determined that the claims are so lacking in merit that counsel cannot ethically advocate either of them.<sup>6</sup> Counsel further represented that, following a thorough review of the record, counsel was not aware of any other substantial claim for relief available to Defendant Boykin.<sup>7</sup> Defendant's Rule 61 counsel represented to the court that there are no potential meritorious grounds on which to base a Rule 61 motion and has therefore sought to withdraw as counsel.<sup>8</sup>
- 11. In response to Rule 61 counsel's motion to withdraw, Defendant filed an amended motion for postconviction relief essentially re-raising the issues he raised in his original motion. Defendant also filed a motion seeking the appointment of another Rule 61 counsel. Defendant also seeks an evidentiary hearing. <sup>10</sup>
- 12. In order to thoroughly evaluate Defendant's Rule 61 motion, and to determine whether Defendant's Rule 61 counsel's motion to withdraw should be granted, the court enlarged the record by directing Defendant's trial counsel to submit an Affidavit responding to Defendant's ineffective assistance of counsel claim(s). <sup>11</sup>
- 13. In deciding Defendant's Rule 61 motion and counsel's motion to withdraw, the court should be satisfied that Rule 61 counsel made a conscientious examination of the record and the law for claims that could arguable support Defendant's Rule 61 motion.

<sup>&</sup>lt;sup>6</sup> See, Superior Court Docket No. 26- Defendant's Rule 61 counsel's Motion to Withdraw.

<sup>′</sup> Id.

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<sup>&</sup>lt;sup>9</sup> Superior Court Docket No. 28.

<sup>&</sup>lt;sup>10</sup> Superior Court Docket No. 28.

<sup>&</sup>lt;sup>11</sup> Super.Ct.Crim.R. 61(g)(1) and (2); Superior Court Docket No. 27.

In addition, the court should conduct its own review of the record in order to determine whether Defendant's Rule 61 motion is so totally devoid of any, at least, arguable claims. 12

#### **DEFENDANT'S RULE 61 MOTION IS WITHOUT MERIT**

- 14. In his Rule 61 motion, Defendant claims that his counsel was ineffective for not advising Defendant he had a possible mental illness defense and for not seeking a competency hearing.
- 15. In order to prevail on an ineffective assistance of counsel claim in the context of a plea challenge, it is not sufficient for the defendant to simply claim that his counsel was deficient. The Defendant must also establish that counsel's actions were so prejudicial that there was a reasonable probability that, but for counsel's deficiencies, the defendant would not have taken a plea but would have insisted on going to trial." Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.
- 16. The defense of "not guilty by reason of insanity" is available to a defendant who as a result of mental illness or mental defect lacked substantial capacity to appreciate the wrongfulness of his conduct.<sup>15</sup> The defense of "guilty but mentally ill" is available to a defendant who suffers a psychiatric disorder which substantially disturbed such person's

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<sup>&</sup>lt;sup>12</sup> See, for example, *Roth v. State of Delaware*, 2013 WL 5918509, at \*1 (Del. 2013)(discussing standard to be employed when deciding counsel's motion to withdraw on a defendant's direct appeal.).

<sup>&</sup>lt;sup>13</sup> Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984); Somerville v. State, 703 A.2d 629, 631 (Del. 1997); Premo v. Moore, 131 S.Ct. 733, 739-744 (2011).

<sup>&</sup>lt;sup>14</sup> Younger v. State, 580 A.2d 552, 556 (Del. 1990).

<sup>&</sup>lt;sup>15</sup> 11 *Del. C.* § 401(a).

thinking, feeling or behavior and that left such person with insufficient willpower to choose whether to do the act or refrain from doing it. 16

- 17. It is not a defense if the alleged insanity or mental illness was proximately caused by the voluntary ingestion, inhalation or injection of intoxicating liquor, any drug or other mentally debilitating substance, unless such substance was prescribed for the defendant by a licensed health care practitioner. 17
- 18. In this case, Defendant's trial counsel advised that he did not assert a mental illness defense because Defendant did not meet the requirements for any such defense. 18
- 19. Defendant's counsel represented that although Defendant had a history of mental illness going back some years, the mental health history or mental disorder was not of such a nature that he lacked the substantial capacity to appreciate the criminal nature of his conduct. 19 In addition, Defendant in his statement to the police admitted that he was intoxicated on the night of the offense, and the voluntary ingestion of drugs or alcohol is not a defense.<sup>20</sup> In fact, at Defendant's sentencing, he apologized to the court for his conduct and for "allow[ing] substances to cloud [his] better judgment."<sup>21</sup>
- 20. Likewise, Defendant's Rule 61 counsel seeks to withdraw because "[a]fter reviewing the plea agreement, the court file and trial counsel's file (including a DVD recording of the Petitioner's statement to the police)," Rule 61 counsel does not believe

<sup>&</sup>lt;sup>16</sup> 11 *Del. C.* § 401(b). <sup>17</sup> 11 *Del. C.* § 401 (c).

<sup>&</sup>lt;sup>18</sup> Affidavit of Defendant's Trial Counsel, Superior Court Docket No. 31- Paragraph 5.

<sup>&</sup>lt;sup>19</sup> Affidavit of Defendant's Trial Counsel, Superior Court Docket No. 31- Paragraph 5.

<sup>&</sup>lt;sup>20</sup> Affidavit of Defendant's Trial Counsel, Superior Court Docket No. 31- Paragraph 5; See, 11 Del. C. § 401 (c).

<sup>&</sup>lt;sup>21</sup> April 13, 2012 Sentencing Transcript, at pgs. 8-9.

that the petitioner had a defense of mental illness that could have been raised in this case.22

- 21. As to Defendant's second allegation, that there should have been a competency hearing in this case, under Delaware law, a defendant is incompetent to stand trial if the trial judge finds after a hearing that because of mental illness or mental defect, a defendant is unable to understand the nature of the proceedings against the accused or to give evidence in the accused's own behalf or to instruct counsel on the accused's own behalf.<sup>23</sup>
- 22. Defendant's trial counsel, in his Affidavit, represented that there was no basis to request a competency hearing. Defendant fully understood his rights and the manner in which the case was handled. The plea was entered in open court, and Defendant was asked the requisite questions. Defendant clearly indicated that he understood the nature of the proceeding against him, the penalty he was facing and the rights he was waiving.<sup>24</sup>
- 23. Rule 61 counsel likewise represented that after a thorough review of the record, Rule 61 counsel found no merit to Defendant's claim that there should have been a competency hearing.<sup>25</sup>
- Defendant's Rule 61 claims are also contradicted by his own representations to 24. the court during his plea colloquy and sentencing hearing. Defendant represented to the court that he was of sound mind to accept the plea and then demonstrated that fact to the court with his clear, appropriate and coherent responses to the court's inquiries both during the plea colloquy and during the sentencing hearing.

<sup>24</sup> Affidavit of Defendant's Trial Counsel, Superior Court Docket No. 31- Paragraph 6.

<sup>&</sup>lt;sup>22</sup> Rule 61 Counsel's Motion to Withdraw, Superior Court Docket No. 26, at pgs. 3-4. <sup>23</sup> 11 *Del. C.* § 404(a).

<sup>&</sup>lt;sup>25</sup> Rule 61 Counsel's Motion to Withdraw, Superior Court Docket No. 26, at pgs. 3-4.

- 25. During the plea colloquy, Defendant's trial counsel, Kester I.H. Crosse, Esquire, represented to the court that Defendant had been admitted to the Rockford Center sometime around 2000 and that Defendant was presently taking psychotropic medicines. but that counsel was "absolutely certain that [Defendant Boykin] understands what he is doing today."<sup>26</sup> Counsel further represented that he believed Defendant Boykin's plea was being entered knowingly, intelligently and voluntarily.<sup>27</sup>
- 26. Likewise, on the Truth-in-Sentencing Guilty Plea Form, Defendant represented that he had been hospitalized at the Rockford Center and was presently taking psychotropic medicines.<sup>28</sup>
- 27 Defendant personally represented to the court that while he was taking psychotropic medications, that the psychotropic medications did not affect his ability to understand what was going on.<sup>29</sup>
- 28. During the plea colloquy, Defendant Boykin represented to the court that he had carefully read and understood all the information in the truth-in sentencing guilty plea form and the plea agreement, and that he reviewed and discussed the documents with his counsel.<sup>30</sup> Defendant represented that he was satisfied with his counsel's representation of him.<sup>31</sup>
- 29. Defendant also advised the court that he understood that he could be sentenced between 14 years of incarceration, which was the minimum mandatory sentence, up to 123 years.<sup>32</sup> Defendant represented that nobody was forcing him to enter his plea.

January 19, 2102 Plea Transcript, at pg. 3.
 January 19, 2012 Plea Transcript, at pg. 3.

<sup>&</sup>lt;sup>28</sup> Truth-In-Sentencing Guilty Plea Form dated January 19, 2012. <sup>29</sup> January 19, 2012 Plea Transcript, at pgs. 3-4.

<sup>&</sup>lt;sup>14</sup> January 19, 2012 Plea Transcript, at pgs. 4-6.

<sup>&</sup>lt;sup>31</sup> January 19, 2012 Plea Transcript, at pg. 5.

<sup>&</sup>lt;sup>32</sup> January 19, 2012 Plea Transcript, at pg. 5.

Defendant represented that he was freely and voluntarily pleading guilty to the charges that comprised the plea agreement. Defendant represented that he was not being threatened or forced to do so by his attorney, by the State, or by anyone else.<sup>33</sup>

- 30. Defendant also acknowledged his guilt and acknowledged that he was voluntarily pleading guilty to all six of the charges that comprised the plea agreement.<sup>34</sup>
- 31. Based on Defendant's representations during the plea colloquy, the court found that Defendant's plea was knowingly, intelligently and voluntarily given, and the court accepted the plea.<sup>35</sup>
- 32. Prior to Defendant's sentencing, a pre-sentence investigation was conducted. In addition, a psycho-forensic evaluation was performed on Defendant Boykin. At Defendant's sentencing on April 13, 2012, the psycho-forensic report was submitted and made a part of the court record.<sup>36</sup>
- 33. The pre-sentence investigation, along with the psycho-forensic evaluation, revealed, *inter alia*, that Defendant had a dysfunctional background, suffered from major depression and was possibly diagnosed with mental conditions including bipolar disorder and attention deficit hyperactivity disorder (ADHD), and that he had a history of drug abuse.<sup>37</sup>

<sup>&</sup>lt;sup>33</sup> January 19, 2012 Plea Transcript, at pgs. 5-7; Truth-In-Sentencing Guilty Plea Form dated January 19, 2012.

<sup>&</sup>lt;sup>34</sup> January 19, 2012 Plea Transcript, at pgs. 6-8.

January 19, 2012 Plea Transcript, at pg. 8.

<sup>&</sup>lt;sup>36</sup> April 13, 2012 Sentencing Transcript, at pg. 3-4, 12.

<sup>&</sup>lt;sup>37</sup>April 13, 2012 Sentencing Transcript, at pgs.4-6.

- 34. Defendant addressed the court during his sentencing in a clear, coherent and concise manner. He apologized to the court for allowing substances to cloud his better judgment, and also apologized to his mother and to the victims.<sup>38</sup> Defendant told the court he took full responsibility for his actions.<sup>39</sup>
- A defendant is bound by his answers on the plea form and by his testimony at the 35. plea colloquy in the absence of clear and convincing evidence to the contrary. 40 In this case, the Truth-in-Sentencing Form and plea colloquy reveal that Defendant knowingly, voluntarily and intelligently entered a guilty plea to the charges for which he was sentenced.
- 36. Defendant has not presented any clear, contrary evidence to call into question his prior testimony at the plea colloquy or answers on the Truth-In Sentencing Guilty Plea Form. As confirmed by the plea colloquy and the Truth-In Sentencing Guilty Plea Form, the court ensured that Defendant Boykin understood the terms of plea agreement and the truth-in-sentencing guilty plea form. Defendant represented to the court that he understood the rights he was waiving and the consequences he faced as a result of his guilty plea.
- 37. Defendant informed the court that he understood the plea and its consequences. Defendant is bound by these representations. The record reflects that Defendant entered his plea knowingly, intelligently and voluntarily.

April 13, 2012 Sentencing Transcript, at pgs. 8-10.
 April 13, 2012 Sentencing Transcript, at pgs. 9-10.
 State v. Harden, 1998 WL 735879, \*5 (Del. Super.); State v. Stuart, 2008 WL 4868658, \*3 (Del. Super.) 2008).

- 38. Defendant's ineffective assistance claim(s) is undermined by the record and fails to satisfy *Strickland*. Defendant fails to state a legitimate ground for relief against his counsel. The conduct of defense counsel does not appear to be deficient in any regard nor has Defendant shown any actual prejudice allegedly as a result thereof.
- 39. The court has reviewed the record carefully and has concluded that Defendant's Rule 61 motion is without merit and devoid of any other substantial claims for relief. The court is also satisfied that Defendant's Rule 61 counsel made a conscientious effort to examine the record and the law and has properly determined that Defendant does not have a meritorious claim to be raised in his Rule 61 motion.
- 40. Defendant's request for an evidentiary hearing is denied. The submissions of the parties and the evidentiary record were carefully, fully and thoroughly considered. Defendant's allegations were either reasonably discounted as not supported by the record, persuasively rebutted by defense counsel's Affidavit, or not material to a determination of Defendant's claim.
- Defendant's request for another appointment of counsel is hereby denied. Defendant was appointed counsel to assist Defendant on his Rule 61 motion and counsel has determined that Defendant's claims are so lacking in merit that counsel cannot ethically advocate them. Moreover, following a full, thorough and complete review of the case, counsel has determined that there are no potential meritorious grounds on which to base a Rule 61 motion. Defendant is not entitled to the appointment of successive, different counsel, each time the one before concludes there is no merit to his claims. 41

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<sup>&</sup>lt;sup>41</sup> See, Superior Court Criminal Rule 61(e).

For all of the foregoing reasons, Defendant's Motion for Postconviction Relief should be denied and Defendant's counsel's motion to withdraw should be granted.

### IT IS SO RECOMMENDED.

Commissioner Lynne M. Parker

oc: Prothonotary cc: Kester I.H. Crosse, Esquire cc: Mr. Nathan R. Boykin